

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 1st day of August, two thousand and six.

PRESENT:

HON. DENNIS JACOBS,
HON. ROBERT D. SACK,
HON. BARRINGTON D. PARKER,
Circuit Judges.

Sisil Prasad Wijesiriwardena, Sriyanthie Wijesiriwardena,
Nadishani Wijesiriwardena, Russell Wijesiriwardena,

Petitioners,

v.

No. 05-2906-ag
NAC

Alberto R. Gonzales,¹ Attorney General of the United States,
William Cleary, Field Office Director Deportation and
Removal, Buffalo District, Immigration and Customs
Enforcement, United States Department of Homeland Security,

Respondents.

¹Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Alberto R. Gonzales is automatically substituted for former Attorney General John Ashcroft as a respondent in this case.

1 FOR PETITIONER: Mark T. Kenmore, Buffalo, New York.

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3 FOR RESPONDENT: Terrance P. Flynn, United States Attorney for the
4 Western District of New York, Christopher V. Taffe,
5 Assistant United States Attorney, Rochester, New York.

6 UPON DUE CONSIDERATION of this petition for review of a decision of the Board of
7 Immigration Appeals (“BIA”), it is hereby ORDERED, ADJUDGED, AND DECREED, that the
8 petition for review is DENIED.

9 Sisil Prasad Wijesiriwardena, though counsel, petitions for review of the BIA decision
10 affirming Immigration Judge (“IJ”) Philip Montante’s decision denying his applications for
11 asylum, withholding of removal, and CAT relief. We assume the parties’ familiarity with the
12 underlying facts and procedural history of the case.

13 Where, as here, the BIA summarily affirms the decision of the IJ without issuing an
14 opinion, *see* 8 C.F.R. § 1003.1(e)(4), we review the IJ’s decision as the final agency
15 determination. *See, e.g., Twum v. INS*, 411 F.3d 54, 58 (2d Cir. 2005); *Yu Sheng Zhang v. U.S.*
16 *Dep’t of Justice*, 362 F.3d 155, 158 (2d Cir. 2004). We review *de novo* questions of law and the
17 application of law to undisputed fact. *See Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir.
18 2003). However, we review the agency’s factual findings under the substantial evidence
19 standard, treating them as “conclusive unless any reasonable adjudicator would be compelled to
20 conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B); *see, e.g., Zhou Yun Zhang v. INS*, 386 F.3d
21 66, 73 n.7 (2d Cir. 2004).

22 Assuming that we have jurisdiction to review the denial of relief here, *see, e.g.,*
23 *Ivanishvili v. U.S. Dep’t of Justice*, 433 F.3d 332, 338 n.2 (2d Cir. 2006), the IJ’s determination
24 is upheld because the adverse credibility finding is supported by substantial evidence. The IJ was

1 reasonable in finding that Wijesiriwardena's substantial delays in seeking asylum, and in coming
2 forward with some of the most striking allegations in his claim until the day of his hearing,
3 seriously undermined both his credibility and the strength of his subjective fear. Wijesiriwardena
4 traveled to Kuwait in 1991, shortly after he allegedly experienced severe beatings and sexual
5 assault in prison, and remained there for eight years, working for a U.S. army-affiliated company.
6 Although we reject the IJ's finding that he was firmly resettled in Kuwait, because the IJ did not
7 conduct an adequate inquiry into the totality of the circumstances of his stay there, *see Sall v.*
8 *Gonzales*, 437 F.3d 229, 235 (2d Cir. 2006), we find that the IJ was reasonable in emphasizing
9 Wijesiriwardena's failure to seek any kind of protection from either the Kuwaiti or U.S.
10 government at the time. *See Cao He Lin v. U.S. Dept. of Justice*, 428 F.3d 391, 401 (2d Cir.
11 2005).

12 Wijesiriwardena claimed that the army continued to pursue him upon his return to Sri
13 Lanka in 1999, and that he was fleeing for his life when he first arrived in the United States in
14 November 2000. However, he did not make this claim to the immigration officers at the airport
15 in New York, but instead proceeded to Canada and filed for asylum there. He did not file for
16 asylum in the United States until after Canada had denied his claim and returned him across the
17 border. Even after consulting with both a lawyer and a mental health counselor in the United
18 States, however, he failed to include several serious allegations in his application, including that:
19 the army beat him severely when he declined to kill a Tamil prisoner with an axe, an army officer
20 made a sexual advance on him, the army sent his parents a casket full of body parts, and his
21 daughter developed epilepsy as a result of a threatening visit from the army. Wijesiriwardena
22 also failed to provide corroboration of any of these allegations, each of which went to the heart of

1 his claim of physical and psychological abuse from the Sri Lankan army. *See, e.g., Xu Duan*
2 *Dong v. Ashcroft*, 406 F.3d 110, 111-12 (2d Cir. 2005); *Zhou Yun Zhang*, 386 F.3d at 78.
3 Wijesiriwardena had numerous opportunities to seek protection, and was on notice that he
4 needed to be thorough in presenting his case after Canada denied his claim for insufficient
5 evidence; therefore, the IJ reasonably rejected his various explanations for the omissions as
6 inadequate. A reasonable adjudicator would not be “compelled to conclude to the contrary.” 8
7 U.S.C. § 1252(a)(4)(B). Moreover, because he did not allege an independent factual basis for
8 either withholding of removal or CAT relief, the adverse credibility finding is also fatal to those
9 claims. *See Xue Hong Yang v. U.S. Dep’t of Justice*, 426 F.3d 520, 523 (2d Cir. 2005).

10 _____For the foregoing reasons, the petition for review is DENIED. Having completed our
11 review, any stay of removal that the Court previously granted in this petition is VACATED, and
12 any pending motion for a stay of removal in this petition is DENIED as moot. Any pending
13 request for oral argument in this petition is DENIED in accordance with Federal Rule of
14 Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(d)(1).

15 FOR THE COURT:

16 Roseann B. MacKechnie, Clerk

17
18 By: _____

19 Oliva M. George, Deputy Clerk